Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-367

DONALD DOUGLAS FAULKNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, Donald Douglas Faulkner, respectfully petitions this Honorable Court for a Writ of Certiorari to review a Judgment and Opinion of the United States Court of Appeals for Sixth Circuit entered in this cause.

OPINIONS BELOW

A Judgment (Appendix D) was entered by the District Court on December 19, 1974, and is not reported. The Opinion of the Sixth Circuit Court of Appeals (Appendix B) was filed on July 9, 1976, and is not yet reported.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals sought to be reviewed and the date of its entry is July 9, 1976 (Appendix C). An Order of the Court of Appeals denying a timely Petition for Rehearing was entered August 13, 1976 (Appendix D). This Court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 16 (b) (now Rule 16 (a) (1) (C)) authorizes a defendant pursuant to a timely Motion to conduct a scientific examination of a document in the hands of the Government Attorney, where said document is intended to be used at trial, and introduced as evidence at trial?

2. Whether Rule 16 (b) (now Rule 16 (a) (1) (C)) is limited to pretrial discovery, or does it impose a continuing duty on the Government throughout the trial?

3. Whether the United States Attorney had a duty under the due process provisions of the Fifth Amendment to the United States Constitution as interpreted by this Court in *Brady* v. *Maryland* to provide possible exculpatory evidence where the Court was moved for the evidence and the Court rather than rule directly, abdicated its discretion in favor of the discretion of the United States Attorney?

CONSTITUTIONAL PROVISIONS AND THE FEDERAL RULES OF CRIMINAL PROCEDURE

1. Rule 16 (b), Federal Rules of Criminal Procedure (1966 as amended):

> "(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

2. Fifth Amendment to the United States Constitution:

AMENDMENT V

> No Person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner, Donald Douglas Faulkner, a former Police Officer of the Newport, Kentucky Police Department, was indicted, together with two other Police Officers in a fourteen Count Indictment returned May 7, 1974, by a Grand Jury sitting in the United States District Court for the Eastern District of Kentucky. That Indictment charged the Petitioner in Count I with conspiracy to exort money or other property from one Samuel Harris as an agent of the "Brass Ass" Nightclub in violation of *Title 18 § 1951 of the United States Code*. Counts II, III, and IV of the same indictment charged the Petitioner with three separate substantive violations of *18 USC § 1951*. All three Officers were convicted and all three Officers appealed their conviction to the United States Court of Appeals for the Sixth Circuit.

On July 1, 1974, at the same time as his arraignment, the Petitioner filed a Motion with the District Court requesting that he be permitted to inspect or copy and and all books, papers, documents or other tangible objects in the possession or control of the Government. That Motion was sustained by the District Court in an Order filed on July 15, 1974.

On November 5, 1974, the United States Attorney filed a Statement (Appendix E) with the District Court indicating that a certain ledger book which was not located by the United States until October 30, 1974, would be used at the trial set to commence on November 13, 1974. A copy of that Statement was served upon counsel for the Petitioner on November 5, 1974, and the United States Attorney agreed to allow counsel for the Petitioner to inspect the ledger in question. That inspection was accomplished

by counsel on November 8, 1974, only five days before the trial was set to commence.

On November 12, 1974, four days after inspecting the ledger and one day prior to commencement of trial, counsel for the Petitioner filed a Motion which sought an Order requiring the United States to "furnish defense counsel with all information as to water marks, manufacturer's identity and/or other identifying marks of the paper contained in said ledger and make available portions of that original ledger to defense counsel for any scientific testing they may find necessary to the defense." (Appendix F). On November 13, 1974, the Court orally overruled the Motion and filed its written Order to that effect on November 18, 1974 (Appendix G).

The ledger in question is a green cloth bound book approximately eight by ten inches in dimension, and containing ninety-two sheets of paper. The book contains numerous entries allegedly made by one Samuel Harris, the Government's chief witness, during the period September 7, 1973, through January 2, 1974. The entries purport to show sums of money paid to the Petitioner and other members of the Newport, Kentucky Police Department for "protection" during that period of time. The ledger was identified by the witness, Samuel Harris, as such and was admitted into evidence and exhibited to the Jury. Moreover, during both the Direct and Cross Examination of Samuel Harris, the ledger was constantly referred to be the witness to support his oral testimony and to give specifics as to the time, place and amount of the alleged payoffs.

The ledger itself contained no identifying marks whatsoever as to the manufacturer or the source of the book, however, the cloth portion of the front cover had been obliterated by burning, the binding edge of the book had

been completely torn off and several pages upon which information had been written had either the corners burned or had the ink streaked by water. The Petitioner was not completely aware of the significance of either the burning or the streaking until the examination of the witness, Samuel Harris, revealed that the book allegedly had been so burned and streaked with water as a result of its being in a fire at the "Brass Ass" Nightclub that occurred on or about January 2, 1974.

It was after this information came to light that the Petitioner again moved the Court, this time orally, on November 20, 1974, to subject the book, now admittted into evidence as Government's Exhibit 15, to certain chemical testing, principally to determine whether or not residues of gasoline were present on the ledger. The United States Attorney initially indicated that he had no objections to the testing of the book as long as sufficient means were established for the control of the document and that it would not be destroyed. This would have presented no problem as the chemist assured the Court subsequent to this time that the testing would in no way affect the information contained in the book, and moreover, numerous photocopies were available by this time of the information contained in the book and one could have readily been substituted for the original with a stipulation of the parties. Additionally, the FBI Agent in charge of the investigation of this case testified that the normal procedure followed by the FBI would have been to scientifically test the ledger, however, that procedure was not followed in this case because they did not get possession of the document until approximately two weeks prior to the commencement of the trial.

However, the Court after hearing the statement of the United States Attorney to the effect that he had no ob-

jection, told the parties that he would not agree unless the United States District Attorney agreed to it. It was at this point that the United States Attorney changed his position and advised the Court that he would not agree, and on two subsequent occasions specifically objected to the removal and testing of the book. (Appendix H)

The significance of subjecting the ledger to chemical testing arose because of the peculiar circumstances of the origin of the ledger and the testimony of the witness, Samuel Harris, as to how it had become burned. For example, during the trial, the witness Harris was read the following from his Grand Jury testimony of March 1974:

"Q. When you were taking money and paying off, did you keep any records?
A. Yes, I just — I kept records of what I phoned in to the bookkeeper, the accountant.
Q. They would know exactly —
A. How much I paid? No, they wouldn't, because that would be money that would come out of the door, and it would never be shown.
Q. You never kept any actual record of what you paid the police?
A. Just what the Federal Bureau of Investigation went after when he came out of the place."

After reading the above Grand Jury testimony, Harris was then asked as follows:

"Q. So you didn't tell the Grand Jury that you had this book at the time, did you?
A. No, I did not tell the Grand Jury, but I didn't commit perjury, either, . . ."

There was ample evidence to support the fact the fire at the Brass Ass Nightclub was an arson which was kindled with a quantity of gasoline. The chemist produced by the Petitioner testified that any object located in that building

during the fire would contain substantial residues of gasoline which would still be present on the object at this late date. The issue was clearly drawn — at stake was not only the authenticity of Exhibit 15 itself, but also the credibility of the witness, Samuel Harris, upon which the United States had constructed its case.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE OPINION BELOW CONSTRUED RULE 16 (b) (NOW RULE 16 (a) (1) (C)) SO AS TO PREVENT THE DEFENDANT FROM CONDUCTING HIS OWN SCIENTIFIC EXAMINATION OF A DOCUMENT IN THE HANDS OF THE GOVERNMENT'S ATTORNEY WHERE SAID DOCUMENT IS INTENDED TO BE USED AT TRIAL AND SUBSEQUENTLY WAS INTRODUCED AS EVIDENCE IN THE TRIAL WHICH IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS.

The issue sought to be reviewed in this case presents not only what appears to be a case of first impression, but also presents, at least in part, a conflict between the position of the Sixth Circuit in this case and the position of the United States Court of Appeals for the Fifth Circuit in *United States* v. *James,* 495 F.2d 434 (5th Cir., 1974); the Second Circuit in *United States* v. *Wolfson,* 431 F.2d 804 (2nd Cir., 1969); and the District of Columbia Circuit in *United States* v. *Bishton,* 463 F.2d 887 (D.C. Cir.,

1972). It is a case of first impression in that Petitioner is not aware of any instances where a Defendant has sought and been denied, both before and during the trial, to subject a document or other piece of evidence to scientific examination.

The language of *Section 16(b)* of the Federal Rules of Criminal Procedure at the time of trial, permitted the Trial Court discretion as to whether or not it should order the attorney for the Government to provide to the Defendant for purposes of inspection and copying books, papers, documents, or other related items. That rule has, of course, been amended to provide that the Government upon request, "*shall* permit the Defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof." *Rule 16(a)(1)(C) Federal Rules of Criminal Procedure.* Prior to the *1975 Amendment,* while production under *Rule 16(b)* was discretionary with the Court. the request had to be based upon a showing by the Defendant that the document sought to be discovered was material to the preparation of his defense, and furthermore, that the request for production was reasonable. Under the Rule, as it is now amended, the Defendant must show either one of three conditions to exist: (1) that the matter sought to be discovered is material; (2) that the matter sought to be discovered is intended for use by the Government as evidence in chief at the trial, or (3) that the matter sought to be discovered was obtained from or belonged to the Defendant.

The only difference then that appears between *Rule 16,* as it relates to discovery of documents is the more particularity with which materiality is defined and the elimination of the requirement that the request be reasonable. However, it is submitted that the reasonableness of the request

is still relevant under Rule 16 as amended for Rule 16 (d) (1) provides that the Court may issue a protective Order or modify the Orders on discovery in such a case where there is a sufficient showing of necessity and the Court feels that such an Order would be appropriate.

The question of what is material to a Defendant in the preparation of a case for trial must of necessity depend extensively upon the facts in each individual case. In the instant case, however, it is submitted no reasonable argument can be made for the lack of materiality of the ledger book. First of all, it was an exhibit admitted into evidence and displayed to the Jury, it was used extensively by the Government's chief witness during examination and cross examination, thus, its authenticity certainly becomes a material issue. Perhaps even more important than the physical document itself, however, was the credibility it created for the Government's chief witness, Samuel Harris. If the Exhibit's lack of authenticity could be established, then as a direct result, the credibility of the Government's chief witness would certainly be seriously damaged, if not destroyed.

The United States Court of Appeals for the Ninth Circuit in *United States* vs. *Hibler,* 463 F.2d 455 (9th Cir., 1972) found that where a conviction relied solely upon the testimony of one person, the credibility of that person was highly material to the issue of an accused's guilt or innocence. *Hibler Supra* at Page 460. The United States Court of Appeals for the District of Columbia Circuit has held that notes or memoranda made by the Government's chief witness at the time the transactions were allegedly occurring were discoverable under *Rule 16 of the Federal Rules of Criminal Procedure.* The Court reasoned that the notes were material and since they were not given to a "government agent" they were not barred by *Rule 16 (a) (2) of the Federal Rules of Criminal Procedure. Bishton Supra,* Page 893. However, the Circuit Court refused to upset the conviction in that case because they felt that the error was not sufficiently prejudicial. *Bishton Supra,* Page 893.

But the Petitioner here sought to do more than merely inspect the document, both in his Motion filed prior to trial and the Motion made orally during trial, since he sought also to subject the document to scientific testing for the evidence sought by the Petitioner was not readily available from a mere inspection of the document. The question is thus presented whether or not the request to test the document, scientifically, takes it beyond the purview of Rule 16. It is submitted that it does not for it is accepted practice in many types of cases for the Defendant to have experts examine items of evidence that will be introduced by the government. For example, in *United States* v. *Taylor,* 25 Fed. Rules Decisions 225 (USDC, ED N.Y., 1960) the District Court permitted examination of alleged narcotic drugs and permitted the Defendant's expert to test a portion of the alleged drug to determine whether in fact same was a narcotic drug. In *United States* v. *Hrubik* 280 F.Supp. 481 (USDC Alaska 1968), the Defendant sought and the Court granted permission to have a sample of water subjected to scientific analyzation. The District Court's theory in *Hrubik* was that ". . . anything the Government plans to introduce in evidence against the Defendant is clearly material." *Hrubik Supra* at Page 481. Other areas of scientific examination are presented as a method of every day practice in cases involving forgery and mail fraud where the Defendant seeks to have handwriting experts examine the original documents in order that a Defendant might be placed in the position of having

expert testimony available to counter that produced by the prosecution as to the source of the handwriting.

Perhaps the closest any other Circuit has come to the issue presented was when the Second Circuit was presented the issue in *United States* v. *Wolfson,* 431 F.2d 804 (2nd Cir., 1969). In *Wolfson Supra,* the Defendant sought to scientifically examine a letter during a course of a hearing on a Motion for new trial and while the Second Circuit affirmed the District Court's denial of that Motion, it did so not on the basis that it disapproved of the scientific testing of the letter, but rather on the basis that the Appellants had already had ample opportunity to subject the documents to scientific testing and the Motion made some four days prior to the commencement of the hearing would have anly served to delay the hearing further.

2. RULE 16 (b) (NOW 16 (a) (1) (C)) IMPOSES A CONTINUING DUTY ON THE GOVERNMENT TO PROVIDE DISCOVERABLE MATERIAL THROUGHOUT THE TRIAL WHERE PROPER MOTION WAS MADE PRIOR TO THE COMMENCEMENT OF TRIAL AND RENEWED DURING THE TRIAL ITSELF

As was noted above, the Motion of the Petitioner was renewed after the trial had commenced and after the significance of the burn and water marks on the ledger became apparent to the Petitioner, while in the normal course of events a request such as this made during the course of the trial would perhaps cause a delay in the trial, such was not the circumstance in the instant case for the District Court had previously recessed the trial for a period of approximately four days, including a weekend, to allow

counsel for the various Defendants time to read voluminous Grand Jury Transcripts that were provided pursuant to *18 USC 3500* (The Jencks Act) and the chemist produced by the Petitioner at that time testified that he could perform all necessary tests within the period of time that the Court was in recess. Moreover, although not specifically raised by the United States Attorney in opposition to the Motion made during trial, it is clear that *Rule 16* is not limited to discovery to be accomplished solely prior to the commencement of trial.

This Court considered a similar matter in *United States* v. *Nobles,* 422 US 225, 95 S. Ct. 2160, 45 L. Ed2d 141 (1975), wherein this Court approved the action of the District Court Judge in ordering a Defendant to produce under the provisions of *Rule 16,* for the inspection of the United States Attorney, a statement of an investigator hired by the Defendant if the Defendant wished to call the investigator to testify. This Court observed:

> "The Government's right of discovery arises only after the Defendant has successfully sought discovery under sub-sections (a) (2) or (b) and is confined to matters 'which the Defendant intends to produce at trial.' Fed. Rules Crim. Proc. 16 (c). This hardly suggests any intention that the Rule would limit the Court's power to order production once trial has begun." *Nobles Supra* at 45 L. Ed2d Page 152.

Moreover, this Court in *Footnote 9,* noted as follows:

> "Rule 16 (g) imposes a duty to notify opposing counsel or the Court of the additional materials previously requested or inspected that are subject to discovery or inspection under the rule, and it contemplates that this obligation will continue during trial. The obligation under Rule 16 (g) depends, however, on a previous request for or order of discovery. The fact that

this provision may have some effect on the parties conduct during trial does not convert the rule into a general limitation on the Court's inherent power to control evidentiary matters." *Nobles Supra* at 45 L. Ed. 2d Page 152.

While *Nobles Supra* involves a direct interpretation of the Government's right to discovery under *Rule 16,* it is submitted that at least insofar as it applies to discovery during trial, the same interpretation should be afforded the Defendant's right to discovery under Rule 16 (a) (b) and (c).

While the *Rules of Criminal Procedure* must of necessity have as one of its purposes the regulation of the methods of combat before the Courts, their most important purpose is to facilitate the administration of justice within the Federal Courts. As this Court sstated in *United States* v. *Nixon,* 418 US 483, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), at Page 1064, "we have elected to employ an adversary system of criminal justice in which the parties contest all issues before a Court of law. The need to develop relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in this system depend on full disclosure of all the facts, within the framework of the rules of evidence." 41 L. Ed. 2d at 1064. It is this end that the Petitioner sought, that is, to place before the Jury all the relevant facts including those that might bear heavily on the credibility of the Government's chief witness.

3. THE TRIAL COURT BY ABDICATING ITS DISCRETION IN FAVOR OF THE DISCRETION OF THE UNITED STATES ATTORNEY AS TO WHETHER OR NOT CERTAIN MATERIAL OF POSSIBLE EXCULPATORY NATURE SHOULD BE PRODUCED FOR EXAMINATION AND TESTING BY THE DEFENDANT VIOLATED THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS CONSTRUED BY THIS COURT IN *BRADY VS. MARYLAND*

When the Petitioner orally moved the Court for an Order granting them permission to chemically test the ledger, the first response of the United States Attorney was to the effect that as long as the chemical testing could be done without changing any of the composition of the book, then he would interpose no objection so long as a proper means of control could be established. The Court then interjected that it would not sustain the Motion of the Petitioner to chemically test the book unless the United States Attorney agreed to it. It was at this point that the United States Attorney changed his position and announced that he would not agree to the Petitioner having the book scientifically tested (See Appendix H). It is suggested that this procedure adopted by the Trial Court in effect surrendered to the United States Attorney that discretion that should have been exercised by the Trial Court under *Rule 16* and thus placed the United States Attorney in the position of preventing this Petitioner from having access to information that could have materially assisted him in his defense and could have been highly exculpatory of the charges leveled in the Indictment.

This Court in the landmark decision of *Brady* v. *Maryland,* 373 US 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) clearly established that it is a violation of due process for the prosecution to suppress evidence that is material to the guilt of a Defendant or the punishment to be levied upon him in the event he is found guilty. The Court in *Brady Supra* held that such a suppression was a violation of the due process requirements "irrespective of the good faith or bad faith of the prosecution." *Brady Supra* at 10 L. Ed. 2d 218.

This Court further expanded the reasoning in *Brady Supra.* In *Giglio* v. *United States,* 405 US 150, 92 S. Ct. 763, 31 L. Ed2d 104 (1971), wherein the Court reasoned that the suppression of evidence favorable to an accused by the prosecution is a violation of due process irrespective of whether or not the attorney charged with control of the case was aware that he was suppressing the evidence favorable to the accused, consequently, if any doubt existed after *Brady Supra* regarding the issue of the good faith of the prosecution, it was eliminated with this Court's decision in *Giglio Supra.* In *Giglio,* the factual situation involved a witness who had prior to his testimony been promised by someone other than the trial attorney that if he gave testimony to a Grand Jury and to a trial Jury, he would not be prosecuted. When questioned at trial, the witness denied that any arrangements were made or that he expected any favorable treatment.

The present case is much like *Giglio Supra* in that not only did the prosecution depend substantially on the testimony of one witness, in the instant case, the information sought could possibly not only damage the credibility of the Government's chief witness, but in all probability, would have resulted in the exclusion of the ledger as an exhibit. The failure to permit the Petitioner to scientifically test the ledger, is rendered even more inexcusable by the testimony of the FBI Agent in charge of the investigation, wherein he made it clear that had his office had the document in its possession a sufficient period of time prior to trial, they would have subjected it to scientific testing to determine its authenticity. If that had been the case, the Petitioner would have clearly been entitled to the results of that scientific testing under the provisions of *Rule 16(a) of the Federal Rules of Criminal Procedure* in effect at the time of the trial. Is the Petitioner then to be denied access to information that would normally be available to him solely because the prosecution obtained the document only two weeks prior to trial and did not have sufficient time to carry out its normal procedures?

Perhaps, the most difficult aspect of this matter is that it is impossible at this point in time for the Petitioner to state unequivocally that scientific testing of the ledger would have resulted in a showing that the ledger could not have been in the fire and retrieved from same in accordance with the testimony of the witness Harris, for the Petitioner is placed upon the horns of an impossible dilemma in that the lower Courts have all appeared to say to him that because you cannot conclusively establish what results scientific testing would produce, you are not going to be permitted to have the ledger for testing. Perhaps the closest any Court has come to this dilemma was the Fifth Circuit Court of Appeals in the matter of *United States* v. *Hildebrand,* 506 F.2d 406 (5th Cir. 1975). In *Hildebrand,* extensive pre-trial discovery was engaged in by the Defendants between July 30th and August 6th. Approximately one month after the United States Attorney's Office had complied with the discovery, defense counsel apparently learned of additional documents that had allegedly been given to postal inspectors some years before. Additional

demand was made for them by the defense attorneys and they were notified by the United States Attorneys Office that additional documents had been obtained and that copies would be provided shortly. The additional documents consisted of copies of contracts exactly the same except for time and place as the contracts provided earlier, however, it was shown that the source of these documents was not the postal inspector but rather witnesses who were to be called by the United States Attorney and who had produced those documents when questioned by the United States Attorney in his preparation for trial. Defense counsel claimed on the basis of the information that they had that additional documents were still in the hands of the postal inspector, however, no evidence was ever produced to establish that the postal inspector had such documents and no such documents were ever introduced at trial.

The Fifth Circuit refused to reverse the convictions on the basis of the United States Attorney's failure to surrender the alleged documents in the hands of the postal inspector. The Fifth Circuit's reasoning is best set forth in its own words:

> "Here Appellants simply assert that if the documents they assume existed had been presented to them, their memory of events might have been sharpened and quickened. We refuse to reverse their convictions on such a *slender conjectural thread.*" *Hildebrand Supra* at Page 409

The only possible benefit raised by the Defendants in *Hildebrand* was that if they had had possession of the documents (assuming, of course, they existed) then "their memory of events might have been sharpened and quickened." It is suggested that the Petitioner in this case offers much more than such a slender conjectural thread, but

rather offers a strong taut line between the evidence sought to be discovered and under the exclusive control of the United States Attorney, by virtue of the Court's ruling, and the result that could be expected had that evidence been produced to him for scientific examination.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Eldon Webb, United States Attorney, Post Office Box 1490, Lexington, Kentucky 40501; and to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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APPENDIX A

Nos. 75-1778, -1779, -1780

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD D. FAULKNER,
Defendant-Appellant.

No. 75-1779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM E. WELLS,
Defendant-Appellant.

No. 75-1780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JERRY MCCLANAHAN,
Defendant-Appellant.

APPEAL from United States District Court for the Eastern District of Kentucky, at Covington.

Decided and Filed July 9, 1976.

Before WEICK, PECK and LIVELY, Circuit Judges.

WEICK, Circuit Judge. This case involves charges of conspiracy, extortion and perjury against three Newport, Kentucky police officers. Appellants Donald D. Faulkner, William E. Wells and Jerry McClanahan, the police officers, were indicted by the grand jury in the District Court on fourteen counts. All three appellants were indicted on one count of conspiracy to violate the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951. In addition, they were charged individually with ten substantive violations of the Hobbs Act (Counts 2-4 charged Faulkner; 5-8 charged Wells; and 9-11 charged McClanahan). Finally, Wells (in Count 12) and McClanahan (in Counts 13-14) were charged with making false statements to the grand jury during its investigation of this case, a violation of 18 U.S.C. § 1623.

The trial of the case against the defendants lasted nearly one month. Essentially it was the Government's position that these three police officers had conspired to and did obtain "protection money" from a well-known nightclub in Newport, Kentucky, named "The Brass Ass." The jury found the defendants guilty on all counts charged against them. They were sentenced to five years imprisonment on each count, the sentences to run concurrently.

The defendants filed separate appeals which were consolidated for oral argument. Pending appeal the defendants have filed in the District Court a motion for a new trial on newly discovered evidence. They also filed a motion to stay this appeal pending the determination of that motion; the motion for a stay pending appeal was denied. The District Court is empowered to hear that motion and need apply to this Court only if it decides to grant the motion during the pendency of this appeal.

I

An important government witness in this case was Samuel Harris, who became manager of the nightclub and assumed control over the books and receipts of the nightclub after Vance Raleigh, the owner of the club, was killed. Harris testified that he had paid protection money in behalf of the nightclub, to the defendants. That testimony was buttressed by a ledger book in which he had recorded the dates and amounts of the various payoffs. Defense counsel were permitted to examine this ledger before the trial.

At the trial Harris testified that he kept the ledger book in his office file cabinet at the nightclub. There was a fire in the nightclub, allegedly caused by arson, while this ledger book was in that file cabinet; the ledger book was water-spotted and singed as a result. Faulkner offered three witnesses who testified that the file drawer in which the ledger book was supposedly kept did not contain the book on the night of the fire.

Faulkner contends that the District Judge erred in refusing to allow Faulkner to have the ledger book chemically tested. At a hearing held to determine whether such testing should be ordered, the alleged chemist offered by the defense testified that he would be able to detect traces of gasoline if the book had been exposed to a gasoline fire. However, because certain circumstances could have prevented the gasoline vapors from permeating the book, an absence of gasoline traces would not establish conclusively that the book was not in the fire. Thus, the District Judge concluded that the testing would not have produced material evidence. We agree.

Competent evidence was presented at the trial in Samuel Harris' testimony that he left the ledger in the file cabinet.

The three witnesses produced by Faulkner testified to the contrary. The issue was thus joined and the factual determination as to which of the witnesses should be believed was within the sole province of the jury. Inconclusive testing (for which no request was made prior to trial) as to the presence of gasoline traces would not have aided the jury in making this determination. As the District Judge stated, in order to use the results of the chemical test it would have been necessary to pile inference upon inference.

In view of the subsequent evidence offered by the Government with respect to the qualifications of the alleged chemist, such testing appears to be all the more pointless. The so-called chemist, "Dr." Papucci, testified that he had a Ph.D. degree in chemistry from Illinois Institute of Technology; the truth was that he had never received any degree from the Institute. He had merely taken six courses there, flunking five. However, "Dr." Papucci did testify at length, and for whatever it was worth, that the ledger could not have been in a fire such as that occurring at the nightclub. Appellant thus received the benefit of the strongest possible testimony from their alleged expert witness.

We find no prejudicial error in the District Court's refusal to allow chemical testing of the ledger.

II

While Samuel Harris was paying off various members of the Newport police force, he was taping those transactions. The Court listened to those tapes *in camera* and held that they could not be introduced into evidence because they were in part unintelligible; however, prior to trial the Government was able to prepare a transcript of

the tapes, and counsel for the defendants were provided with that transcript.

The Government used the transcript intensively in cross-examining the defendants and in examining Samuel Harris. The United States Attorney would read to a defendant a statement from the transcript and would inquire of him whether he had made that statement to Harris. Later, Harris was put on the stand and testified that the statements had been made by the defendants to him. Wells challenges this procedure; he contends that this was a devious procedure used to get the tapes before the jury after they had been held inadmissible by the trial court.

We note first that the tapes were ruled inadmissible at the request of the defendants because they were in part unintelligible and not because they were irrelevant to the cases. The United States Attorney used the transcript of the tapes to refresh Harris' recollection. Documents need not be admitted or admissible in evidence in order to be used to refresh the recollection of a witness. The direct evidence used to impeach the defendants came from Harris who, on redirect examination, testified that he had heard a defendant make each statement which was read to him by the United States Attorney. In addition, on direct examination Harris testified as to the substance of those same transactions.

The determination of whether the transcript of the tapes should be used for the purpose of refreshing the witness' recollection, is within the discretion of the District Judge. *United States* v. *Cranson*, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972). However, some caution must be exercised to insure that the document is not used to put words into the mouth of the witness. *Esperti* v. *United States*, 406 F.2d 148 (5th Cir.), *cert. denied*, 395 U.S. 938 (1969).

Because Harris had testified as to the substance of the transactions he had with each defendant, his testimony occurring prior to the time that the United States Attorney refreshed his recollection as to the exact language by reading from the transcript of the tapes, we find no abuse of discretion in permitting Harris' recollection to be refreshed in this manner.

III

Appellants contend that the admission of Barbara Jenkins' testimony constituted plain error. Jenkins worked at the nightclub prior to the time that Samuel Harris had become the manager. She testified that during the time period of the conspiracy charged under Count 1 of the indictment Wells approached her to collect $500 of protection money which he claimed was owed by the deceased owner of the nightclub to a group of police officers, and that she made the payment to him.

Count 1 of the indictment charged a conspiracy to obtain money from the nightclub induced by the defendants acting under color of official right in their capacities as police officers. The testimony of Jenkins as to the $500-payment constituted proof of an overt act relating to that conspiracy. Admission of the testimony did not constitute error.

Appellants contend further that the trial judge erred in failing to instruct the jury as to the limited application of Jenkins' testimony; however, they failed to enter any objection to the charge with respect to this matter prior to the time the jury retired when the Court requested objections to be made. Fed. R. Crim. P. 30 provides:

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . .

We have held that objections to the jury instructions must be made at the time of trial unless the charge constituted plain error. In view of the fact that the trial judge clearly and explicitly stated that Jenkins' testimony was admissible against all of the defendants for the purpose of establishing the conspiracy, we are unable to find such plain error in the case at bar. *See United States* v. *Billingsley,* 474 F.2d 63 (6th Cir.), *cert. denied,* 414 U.S. 819 (1973). Jenkins' testimony was admissible also against Wells on the substantive offense.

Finally, Wells asserts that the trial court erred in admitting testimony from Jenkins that she paid him $1,000 on another occasion to purchase police protection against the threats of a hit man who was in Newport.

As a general rule, in jury trials evidence of a criminal defendant's prior misconduct is inadmissible in the prosecution's case in chief to show the accused's bad character or criminal propensity. *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975. However, there are exceptions to this general rule which permit evidence of a defendant's prior misconduct to "show motive, intent, absence of mistake or inadvertence, identity of the offender or a common plan, pattern or scheme." *United States* v. *Ring, supra,* at 1004.

The testimony of Jenkins tended to prove that Wells was acting pursuant to a plan or pattern of extortion which characterized his dealings with the nightclub in his official capacity. We find no error in the admission of Jenkins' testimony.

Although the trial judge did not instruct the jury as to the limited nature of this testimony, appellant waived any right to object because the failure to so instruct did not constitute plain error. Fed. R. Crim. P. 30.

Furthermore, McClanahan and Faulkner were not prejudiced by this failure to instruct as the trial judge explicitly instructed the jury at the time the testimony was being elicited that such testimony was not to be considered against them.

IV

When appellant Faulkner was cross-examining Harris he moved the Court for an order requiring the Government to produce any prior statements made by the witness, in possession of the United States Attorney. The trial judge declined to order the production of Harris' testimony before the grand jury. This ruling was in error as the Jencks Act permits a defendant to have such access. 18 U.S.C. § 3500 (e) (3). However, after appellant had completed his cross-examination of Harris the United States Attorney advised the Court that defense counsel should be provided with the grand jury minutes. After receiving and examining the grand jury testimony appellant was then permitted to re-cross-examine Harris.

Appellant concedes the difficulty in finding any prejudice resulting from the initial error by the trial judge. In our opinion the error was cured. We hold that no such prejudice exists. Furthermore, we are of the opinion that the curtailment of the re-cross-examination by the Judge, which is charged as error, served only to limit questions that were cumulative, repetitive and irrelevant to the cases being tried. Limitation of the scope of cross-examination is within the sound discretion of the District Judge and

will not be overturned in the absence of abuse. *United States* v. *Marchesani,* 457 F.2d 1291 (6th Cir. 1972); *Poliafico* v. *United States,* 237 F.2d 97 (6th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957).

We find no abuse of discretion. We conclude that the District Judge permitted a full and fair cross-examination of Harris.

V

Patrolman McClanahan contends that he was denied the effective assistance of counsel when the trial judge refused to grant a continuance of his trial. On the morning of his trial the Judge informed McClanahan's recently retained counsel that he would not be permitted to represent McClanahan because of a "possible conflict" with the State Bar of Kentucky. Another attorney, Ralph Crisci, had been contacted on the preceding Friday in expectation of this occurrence. Crisci appeared that morning in the District Court and had his first opportunity to confer with McClanahan for thirty minutes. Crisci then requested a continuance of the trial so that he could familiarize himself more fully with the case. That request was denied and the trial of the case began that morning.

The ruling on a motion for a continuance is within the sound discretion of the District Court and will not be overturned absent a showing that the ruling constituted an abuse of discretion. *United States* v. *Ploeger,* 428 F.2d 1204 (6th Cir. 1970). Such an abuse of discretion would exist if McClanahan were denied his Sixth Amendment right to the effective assistance of counsel. An analysis of all the facts and circumstances of this case is necessary in order to determine whether McClanahan was denied that

right. *United States* v. *Knight,* 443 F.2d 174 (6th Cir. 1971).

McClanahan was originally represented by Attorneys Charles Schear and Mott Plummer. On October 21, 1974 Plummer filed a motion for both attorneys to withdraw as counsel, stating that Schear was ill and could not participate; that he [Plummer] had filed numerous motions and had attended hearings on those motions; that they would not be able to represent McClanahan and he requested the Court to remove their names as counsel; he stated that McClanahan "did not want a continuance and that he was seeking and had other counsel." The Court granted the motion.

Several of the attorneys whom McClanahan approached had schedule conflicts and thus were unable to represent him. McClanahan also attempted to retain the attorney representing defendant Faulkner; however, Faulkner's counsel declined to take McClanahan's case because of a possible conflict of interest between the two defendants. McClanahan then retained Attorney Barry Wehrman who immediately sought a continuance because of a schedule conflict; his motion was denied. Finally, McClanahan contracted Burton Signer who agreed to represent him; however, Signer was disqualified on the morning of trial, and Crisci, who was contacted on the preceding Friday, took over the case.

No absolute rule can be articulated as to the minimum amount of time required for an adequate preparation for trial of a criminal case. Thus we look for a showing from the defendant of prejudice, *i.e.,* a showing that the continuance would have made relevant witnesses available, or would have added something to the defense. *United States* v. *Moore,* 419 F.2d 810 (6th Cir. 1969); *United*

States v. *Sisk,* 411 F.2d 1192 (6th Cir. 1969), *cert, denied,* 396 U.S. 1018 (1970); *United States* v. *Decker,* 304 F.2d 702 (6th Cir. 1962).

McClanahan was unable to make any showing of prejudice as a result of his late employment of counsel. Our examination of the record and the facts and circumstances of this case in their totality leads us to the conclusion that McClanahan's counsel had more than an adequate amount of time for preparation.

First, we note that the issues in this extortion case were relatively uncomplicated. Further, during most of the pretrial proceedings McClanahan was represented by his original counsel; none of his rights was jeopardized by any lack of assistance prior to the commencement of the trial. Furthermore, the trial lasted nearly one month and there were several adjournments; thus Crisci had many opportunities to consult not only with his client and with McClanahan's prior counsel, but also with counsel for the other defendants. Although the trial began on November 13th, the first witnesses did not take the stand until November 15th; indeed, the important prosecution witness, Samuel Harris, did not take the stand until November 18th. Crisci did not present McClanahan's case until December 3d.

Crisci actively participated in the trial of the case, conducting a vigorous defense, cross-examining Government witnesses, making motion to suppress and dismiss indictment counts, to suppress tapes, and for a recess to study grand jury transcripts; he objected to testimony, and moved for judgment of acquittal. We conclude that there was sufficient time for Crisci to prepare adequately to defend his client. McClanahan's defense was in able hands.

The District Judge refused to grant a continuance because he felt that McClanahan was "temporizing the Court." (A. XIV at 1139). Given this consideration and the fact that McClanahan was able to demonstrate no prejudice resulting to him, we conclude on the facts and circumstances of this case that the District Judge did not abuse his discretion in refusing to grant the continuance. We find no prejudicial error in the record. The judgment of conviction was supported by substantial evidence.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD FAULKNER,
Defendant-Appellant.

Before: WEICK, PECK and LIVELY, Circuit Judges.

JUDGMENT

(Filed July 9, 1976)

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

James A. Higgins, Clerk

APPENDIX C

Nos. 75-1778, -1779, -1780

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD D. FAULKNER,
Defendant-Appellant.

No. 75-1779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM E. WELLS,
Defendant-Appellant.

No. 75-1780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JERRY MCCLANAHAN,
Defendant-Appellant.

ORDER.

(Filed August 13, 1976)

Before: WEICK, PECK and LIVELY, Circuit Judges.

No active judge of this Court having requested that a vote be taken on the suggestions for an en banc hearing on the petitions for rehearing, said petitions were considered by the panel and found not to be well taken.

IT IS THEREFORE ORDERED that the said petitions for rehearing and each of them is hereby denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller, Chief Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON

No. 74-29

UNITED STATES OF AMERICA

v.

DONALD DOUGLAS FAULKNER

JUDGMENT AND COMMITMENT

(Filed December 19, 1974)

On this 11th day of December, 1974 came the attorney for the government and the defendant appeared in person and by counsel, James Cobb and William Oldfield.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty to Counts 1, 2, 3 and 4 of the Indictment of the offenses of wilfully conspiring to affect commerce by extortion, acting under color of official right in violation of Title 18, Sec. 1951; and wilfully affecting commerce by extortion acting under color of official right in violation of Title 18, Sec. 1951, U.S. Code as charged in Counts 1, 2, 3 and 4 of the Indictment and the court having asked the defendant whether he has anything or his attorney has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon, a presentence report was submitted to the Court by the Probation Officer.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years on Count 1; 5 years on Count 2; 5 years on Count 3; and 5 years on Count 4; imprisonment on the said sentences to run concurrently.

IT IS ADJUDGED that the defendant be imprisoned until he is otherwise discharged as provided by law.

The defendant, in the presence of his attorney, was advised by the Court of his right to appeal. Rule 32 (a) (2).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated: December 18, 1974.

/s/ MAC SWINFORD
United States District Judge.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL No. 74-29

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD DOUGLAS FAULKNER, ET AL.,
Defendants.

STATEMENT

Comes now the United States of America, by counsel, to state to the Court that it was brought to the attention of the United Sates Attorney on or about Ocober 30, 1974, hat a ledger book was found which will be used in evidence in this case and testimony will be adduced from those records pursuant to 28 U.S.C. 1732, commonly called the Shop Book Rule, and that one or more witnesses will use entries in this book to support his or her testimony.

Although the United States does not know whether this comes within the requirements for discovery under Criminal Rule 16, the United States does want it made known to the Court and to the defendants that this evidence is expected to be produced. The ledger contains entries

showing alleged payroffs to the defendants and other persons from proceeds of the Brass Ass.

Respectfully submitted,

Eugene E. Siler, Jr.
United States Attorney

CERTIFICATE

I hereby certify that the foregoing Statement was served upon the defendants by mailing copies thereof to the attorneys of record, Hon. James L. Cobb, Jr., 211 E. 4th Street, Covington, Kentucky 41015; Hon. B. H. Berg, 3164 Madison Road, Cincinnati, Ohio 45209; Hon. Charles J. Schear, Campbell Towers, Newport, Kentucky 41071; and Hon. R. Barry Wehrman, 253 Pike Street, Covington, Kentucky 41011, this 5th day of November 1974.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

No. 74-29

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD DOUGLAS FAULKNER, ET AL.,
Defendants.

MOTION

(Filed November 12, 1974)

Comes now counsel for the Defendant, Donald Faulkner, and respectfully moves the Court as follows:

1) To continue the within captioned cause to a later date for the reason that the prosecution failed to make a timely disclosure of a portion of their intended evidence as requested pursuant to Rule 16, to-wit: a certain ledger referred to by the Government in the annexed statement.

As soon as the above annexed statement was received by counsel, counsel promptly called the Honorable Eugene Siler who, in turn, sent the Honorable James Arehart, Assistant United States Attorney to Covington, who along with Agent Harold Harrison of the FBI, displayed the

ledger to counsel at the United States Attorney's office, Third Floor, Post Office Building, Covington, Kentucky, at 3:00 P.M., Friday, November 8, 1974, and thereafter counsel were allowed to copy same.

Counsel avers that the existence of said ledger and its anticipated use were known to the prosecution for a substantial period of time and that this belief is based upon interviews conducted by defense counsel on Saturday and Sunday, November 9th and 10, 1974, wherein it has been disclosed to counsel that a ledger was the subject of questions directed to witnesses appearing before the United States Grand Jury two or three months ago. Counsel further avers that the authenticity of the handwriting appearing in said ledger and the accuracy of the entries in said ledger are vital to the proper defense of this cause now set for trial on November 13, 1974. That exemplars of the handwriting of Sam Harris, the purported author of said ledger, are vital to the defense. That possession of said ledger for the purposes of conducting scientific tests upon same, including but not limited to tests to determine the date of the paper contained therein and the ink used for entries therein are vital to the defense.

2) That the prosecution furnish to defense counsel, authentic exemplars of the author or authors of the ledger's handwriting.

3) That the prosecution furnish defense counsel with the name of the author or authors of said ledger.

4) That the prosecution furnish defense counsel with the name, address, and dates of possession of each person who has maintained possession of the subject ledger since it was authored until the present date.

5) That the prosecution furnish defense counsel with any and all notes, memoranda, log entries, official records

and written statements made by any law enforcement officer or agents or agency thereof and/or by any public officer or any agent or agency thereof, relevant or material to said ledger and/or its possession and control.

6) That the prosecution furnish defense counsel reports or results of any scientific tests or experiments made in connection with said ledger or copies thereof, within the possession, custody, or control of the Government, the existence of which is known, or by the exercise of due diligence, may become known to the Government.

7) That the prosecution furnish defense counsel with all information as to watermarks, Manufacturer's identity and/or other identifying marks of the paper contained in said ledger and make available portions of that original ledger to defense counsel for any scientific testing they may find necessary to the defense.

8) In the alternative, if the Court will not grant the defense a continuance, sufficient to investigate the answer to the questions propounded by Motions 2, 3, and 4, then counsel moves that the Court issue a protective Order directing that the prosecution be prohibited from using said ledger as evidence in this trial for the reason that the prosecution failed in good faith to make a timely disclosure of the existence of said ledger.

COBB, COMBS, BEASLEY &
OLDFIELD

BY: .....

Attorneys for Defendant Faulkner
211 East Fourth Street
Covington, Kentucky 41011

CERTIFICATE

This is to certify that a copy of the foregoing Motion was delivered this 12th day of November, 1974, to the United States Attorney's Office, Post Office Building, 7th & Scott Streets, Covington, Kentucky.

.....

WILLIAM C. OLDFIELD

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL No. 74-29

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD DOUGLAS FAULKNER, ET AL.,
Defendants.

ORDER

(Filed November 18, 1974)

On November 13, 1974, pursuant to Order of September 16, 1974, came the plaintiff by Eugene E. Eiler, Jr., United States Attorney, his Assistants James Arehart and Robert M. Murphy; the defendant Donald Faulkner, in person and by his attorneys, James Cobb and William Oldfield; the defendant William E. Wells, in person and by his attorney, B. H. Berg; and the defendant Jerry McClanahan, in person and by his attorney Ralph Crisci.

In the absence of the Jurors Mr. Crisci orally moved the Court to continue the case as to the defendant McClanahan. The Court heard Mr. Crisci in support of the motion and Mr. Siler in opposition and being advised, overruled the motion.

The Court heard Mr. Oldfield in support of the motion of the defendant Faulkner to dismiss. Mr. Crisci orally moved the Court to join in the motion on behalf of the defendant McClanahan. The Court being advised, overruled the motion as to both defendants.

The Court heard Mr. Oldfield in support of the motion of the defendant Faulkner to continue the case and being advised overruled the motion.

Following a recess for the noon hour, the Court heard Mr. Cobb on the motion filed for the defendant Faulkner on November 12, 1974 with reference to examination tests, etc., of a ledger proposed to be used as evidence for the plaintiff, and being advised overruled the motion.

Mr. Cobb filed for the defendant Faulkner a motion to require the United States to make available to counsel for interview, Barbara Jenkins, a proposed Government witness —." Mr. Crisci orally joined in the motion for the defendant McClanahan. The Court heard counsel on the motion and being advised overruled the motion.

Mr. Cobb and Mr. Crisci filed for the defendants Faulkner and McClanahan a motion to suppress "The intended evidence consisting of video tapes, photographic surveilance and pictures and tape recordings —". Mr. Crisci orally joined in the motion for the defendant McClanahan. The Court heard counsel and, being advised, overruled the motion.

The Court overruled the motion of the defendant Faulkner for a severance filed November 12, 1974, and an oral motion of Mr. Crisci to sever as to the defendant McClanahan.

It was stipulated by the parties that the transcript of certain testimony given before the Grand Jury could be read as evidence taken before the Grand Jury on the date shown without the presence and testimony of Lucy Pratt

Rodman, the duly appointed and sworn Court Reporter who transcribed and certified the transcript.

On motion of the defendant Faulkner, by counsel, the rule as to witnesses was invoked with the provision that Harold Harrison, an F.B.I. Agent, and Special Agents Robert H. Nordurft and Larry Bond, technicians for the F.B.I. who will testify only as to technical details of the production of the evidence, can remain in the courtroom to assist in presenting the case for the plaintiff.

On motion of counsel for the defendants, the defendants were allowed two additional peremptory challenges collectively – a total of twelve, and two additional peremptory challenges as to alternate jurors – or a total of three collectively.

All parties having announced ready for trial, the jurors were called into the courtroom and the process of selecting a jury was begun, but not concluded at the hour of adjournment.

All jurors were admonished by the Court and a recess until 9:00 A.M. on November 14, 1974, was announced.

/s/ MAC SWINFORD
Mac Swinford, Judge

APPENDIX H

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[343] Case No. 74-29, United States against Faulkner and others.

(Reporter's note: Mr. Oldfield and Mr. Cobb came before the Court.)

MR. OLDFIELD: Well, Your Honor, previously we have filed a motion requesting the Court to order the United States to allow us to inspect this ledger book that has been introduced into evidence and to allow us to produce an expert to examine this book relative to its origin or its possible origin and its possible whereabouts and whether it can chemically be shown to have been in the places the Witness Harris has testified it has been, namely this fire.

I have contacted an expert relative to this. I did not know when I talked to him that the Court would recess until Monday. He has agreed to meet me tomorrow morning for the purpose of making a cursory examination of the book. He cannot from that examination make a determination. He has to run chemical tests on it. He has told me that would take approximately two days to do and it would be absolutely necessary to have a laboratory in which to do it. In other words, he would have to take it to his [344] laboratory.

We would ask the Court for an order permitting us to remove this book to this laboratory in the custody of this chemist, for the purpose of analysis. We would, of course, waive any objection that the defendant might have as to chain of possession or anything like that, as to this two-

day period that the chemist would have it. We can assure the Court that this is a reputable person, used by people in this community for such purposes, and he has done it on numerous occasions before, both civilly and criminally, and his integrity I think is beyond reproach. It is no question of any alterations in the book. Besides there have been numerous photocopies made of it at this point and I don't think there is any possibility of that occurring.

THE COURT: No, there are two other defendants in this case. Do you speak for all three defendants? You are attorney of record, you and Mr. Cobb, for one defendant, Mr. Faulkner. Now, there are other defendants to be considered on this.

MR. OLDFIELD: I have not discussed it with the other defendants.

[345] THE COURT: I wouldn't even consider your motion unless it was joined in by the other defendants because I can't permit, over the objection of the defendants, part of the record to be taken out and to be taken to a chemical laboratory, someplace I don't know anything about or have any way of knowing. I am not suggesting that if you do represent them that I would not consider your motion. But you asked the Court here for a two-day delay to get something done and so far as the record shows here now it is only the defendant Faulkner and not the other defendants.

MR. COBB: Your Honor, would you consider the motion subject to those defendants and their counsel signing an entry which I would present to the Court, saying that they did not object, that they joined in this motion? I feel certain that they would.

THE COURT: I'm not suggesting whether I would or wouldn't. I just want to know. That is the primary thing. These defendants, they are not here, they are not

advised of this, and here in the absence of the defendants for the Court to permit or to even consider your motion would not [346] be fair to those other defendants.

MR. OLDFIELD: Might I suggest that I prepare this motion in the form of a written motion which I think I can assure the Court at this time that counsel for the other two defendants would endorse, along with Mr. Cobb and myself for the Defendant Faulkner.

THE COURT: You may prepare it, but I do not want to lead you to believe that I'm going to therefore sustain it.

MR. OLDFIELD: No, I understand that, Your Honor.

THE COURT: I'm suggesting this at this point, that at the threshold, without the concert of all the defendants, that this Court would not consider it at all. They are not present.

MR. OLDFIELD: I understand that, Your Honor.

THE COURT: They are not present in person or by attorney and it would not be fair to them for the Court to rule on it.

MR. OLDFIELD: I assume there would be no objection by the Court if this individual were to view this ledger book in the custody of the clerk, not removing it, that is, physically look at it?

THE COURT: Well, it would have to be in the [347] presence of the United States Attorney.

MR. OLDFIELD: I informed them of this at 10:00 this morning.

THE COURT: I have no objection to your bringing your chemist. I will hear the District Attorney before I finally rule on it, but as far as looking at it in the clerk's office, I assume you would have no objection to that.

MR. SILER: No. We would like to have somebody from our staff or the FBI office present at the time.

THE COURT: Yes, have someone there present at the time. I will sustain that. Now, he is not going to undertake to take any slivers or anything off this book.

MR. OLDFIELD: No, Your Honor. The only thing he is going to do is view the specimen and make a preliminary determination whether he can perform tests on it. That would be done tomorrow morning. I have scheduled him at 9:00. I didn't know at that time that we would be in recess.

THE COURT: Without an objection on the part of the United States, I will sustain your motion.

MR. SILER: Your Honor, we do not plan to be here at that hour of the morning, but we [348] can have a FBI agent to stand in our place and that would be satisfactory, out case agent, Mr. Harrison.

THE COURT: I just want the United States Attorney's office to be represented in some way, either by yourself or some official you designate. I don't want to place the responsibility upon the clerk. It is not his responsibility or the reporter's.

MR. COBB: Your Honor, upon our representation — of course, all you have passed on so far is for the man to come here, which he will be here at a quarter of 9, 9 o'clock to look at it. Your Honor, upon our representation to you, we would like to renew the motion Mr. Oldfield has just made. We will have all of the other defendants and their counsel here tomorrow at 9:00 and after the man has viewed this, we anticipate he is going to say that, as Mr. Oldfield has represented, that he can perform certain tests. I am perfectly willing to have the Court *voir dire* him on those tests, in the presence of the United States Attorney, and then have the Court rule on them but we would like to do that and to accomplish

that and not be frustrated over until Monday. We will get this [349] done between now and Monday.

THE COURT: What is it he is going to test? What is he going to do?

MR. COBB: As pointed out to Your Honor, we sincerely doubt — we have good reason to believe that this book is not authentic. We believe it to be a fabrication. We believe that this man can test this book and tell that it was not in that fire, that it was not in that file drawer, as Sam Harris described, that it has not been exposed to the heat, the temperatures and so forth that were present in that fire.

We have other witnesses, Your Honor, who will tell about what else remained there. We think that this could not have been there. We think that we need the scientific evidence to lay before Your Honor relative to the integrity of this book, whether or not it supports this witness.

THE COURT: What do you have to say, Mr. District Attorney?

MR. SILER: Well, if the Court please, I just don't see how any witness can tell whether a book had been in a fire without knowing what kind of a heat the fire had. I don't see how anybody [350] could do that.

MR. COBB: Your Honor, this is the same lab that did the work for the Kentucky State Fire Marshal's office.

MR. OLDFIELD: That did the chemical work on the arson investigation that was conducted on this fire. The chemist will be the person that did the actual work. I have been told by this chemist this morning that the temperatures in that building ranged anywhere from 1600 to 2000 degrees and that if anything was in that building and exposed to that temperature, it would have undergone a chemical change, significant chemical change, unassociated with any other type of event. There are also indica-

tions, I can assure the Court, that there was in excess of 1,000,000 gallons of water poured on this building for a period of five hours. That in and of itself, there were at times in excess of one foot of water running on the floor, that if that book would have been deluged with that water other chemical changes would have occurred and if not, they would not have occurred.

I submit to Your Honor that these chemical changes did not occur in that paper.

[351] THE COURT: I will let the District Attorney make his statement.

MR. SILER: Well, if Your Honor please, if he can make some kind of test without changing any of the composition of the book and so forth, why we have no objections as long as there is some means of control of the book. But I don't know what means he is going to use, whether he is going to test it with something or what.

MR. COBB: I assume what Mr. Siler means, we're not going to alter any figure or even touch anything about a figure. There are many blank pages in the book. There are many places where the book can be tested without affecting it as an object of testimony whatsoever and we will assure the Court there will be no interference with it as far as the figures contained in it, the figures involved in it.

THE COURT: Well, of course this item is now in evidence and to take a piece of evidence out of the record and to permit it to be taken to a laboratory in some unknown place – where is the laboratory?

MR. OLDFIELD: Cincinnati, Ohio.

THE COURT: I would not agree to that unless [352] the District Attorney agreed to it.

MR. SILER: Well, it is in the custody of the Court. It is actually out of my custody. I would not agree to it.

THE COURT: I personally do not believe that your chemical analysis would be of any value and probably not be competent to offer to the jury if you produced a witness, because I think just from what you have stated here, you have given a hypothetical about how many gallons of water and the heat and so on and so forth, all of which would have to be established by proof before the chemist could express an opinion, anyhow.

MR. OLDFIELD: Your Honor, the chemist would establish these facts by his own testimony.

THE COURT: How?

MR. OLDFIELD: Because, Your Honor, he has tested other pipes, light switches, wiring, etc. that were removed from this building and his testimony would be that they have been altered in chemical structure and could only be altered in temperatures in excess of certain degrees and he stated to me categorically that the temperatures in that building because of the vast amounts of gasoline used to ignite [353] the fire were between 1600 and 2000 degrees.

Your Honor, the chemist has also told me this morning that he can tell me that it was regular and not high test gasoline that was used to ignite the fire and not coal oil or anything else, but regular gasoline. The amount of water is based on statements by the Chief of the Newport Police Department who supervised the operation in the extinguishing of this fire.

THE COURT: Well, I will make this ruling on it. I will overrule your motion subject to – if you can arrange for the U. S. Attorney to supervise this book – I personally am not going to permit you to do it.

MR. SILER: We would object ourselves.

THE COURT: I would sustain the objection.

MR. COBB: Your Honor, may we have, after the chemist views this book at a quarter of 9 or 9 o'clock in the

morning, may we then have an opportunity to place this expert upon the witness stand — we will have the rest of the people here — and then *voir dire* him for the benefit of the Court as to what he can tell and not tell about this, and then make your ruling, for the reason that we think this is the expert on this fire, this is the [354] person who knows more about this fire, has done more research into it than any other person around.

THE COURT: Well, I'm not going to deny you the right to offer your witness if you want to in the morning at 9:00, if you have the other defendants here.

MR. COBB: We will have them here.

MR. SILER: Your Honor, is it possible to set this hearing at 1:30? That is the time that our office is due to come back here about another matter and we would prefer that hour if it is possible at all.

THE COURT: All right. I can't take too much time. I have to start another case in the morning and I would like to have it at 9:00.

MR. SILER: Well, if it is 9:00 we will be here. We will have somebody.

THE COURT: I hate to discommode you.

MR. SILER: We understand.

THE COURT: We have to hear this matter and we have a jury coming and another case to start right away and I'm delaying it to that extent. This case has been delayed and delayed and delayed. It should have been tried and over with. This [355] case should have been over with. Now, I don't know whether we will get to it or not. I've already continued two cases because of this case. I'm not going to put off any more. You have asked for delay to study those transcripts of the evidence before the grand jury, all of which I think is purely for the purpose of delay. There's evidence in this sworn testimony

in this case that Mr. Cobb has this book in his possession in May of 1973.

MR. COBB: Oh, no, sir. If the Court please —

THE COURT: The witness testified that he had it in his office at 10:00 one night in May of 1974, this year.

MR. COBB: Your Honor, if the Court got that impression, that is absolutely —

THE COURT: Well, that is what the witness testified.

MR. OLDFIELD: I don't believe so, Your Honor. He said that he advised us that this book existed.

THE COURT: No, he said the book was there in the office at the time.

MR. OLDFIELD: Your Honor, I would categorically, and I think Mr. Cobb also, deny that he ever saw that book.

[356] THE COURT: All right, he advised you of the existence of the book at that time.

MR. COBB: Well, I guess the only way is that I will have to take the witness stand. That is absolutely untrue.

THE COURT: I just say there is testimony to that effect in the record and to now come around and take the book out and take it to Cincinnati and go through this is not quite in keeping with an orderly procedure.

MR. COBB: If Your Honor please, that book shows, and as Mr. Harrison I'm sure will testify, Mr. Harrison first saw that book on October 30th, 1974 and placed his initials in it. I'm sure that's the reason he did it.

THE COURT: Well, I understand the witness to say that he advised Mr. Cobb of the existence of this book in the presence of Mr. Beasley and some other person in Mr. Cobb's office at 10:00 or sometime in the evening, one night in May, 1974. I'm not saying that that is correct or incorrect. I'm saying that that is evidence in this case that

has so far not been refuted and I am not going to, in the face of the record as it presently stands, permit that book to be taken [357] out of the custody of the United States unless it is by agreement with the District Attorney. That evidence stands uncontradicted. The Court would be very derelict –

MR. OLDFIELD: Your Honor, our reason for wanting to do this, and I don't mean to belabor an issue, but our reasoning is that we feel as categorically as I can say it that this book is nothing more than a fabrication of this witness, that it did not exist in January of 1974 when this night club burned or certainly if it did exist as a piece of paper, it was not in any file cabinet in any fire in the Brass Mule night club on January the 2nd or January the 3rd, 1974.

THE COURT: That may or may not be true, Mr. Oldfield, but there are circumstances and the book itself, the exihibit itself, contains a great deal of other things which would not suggest to this court that it was a pure fabrication after this case started. I don't believe that this witness, discredited as you may attempt to do with him, would have written all the names that are in that book just as a matter of using it as a false bit of evidence in connection with his testimony. He wouldn't have had to do that. These other people's [358] names that are in here have nothing to do with this case, as this indictment presently charges. I don't know what the results might finally be. I don't know what the results are, but there would be no reason to put all the names and all the things in that document for the purpose of making up a fabricated bit of evidence. You have got to rationalize about these things.

MR. OLDFIELD: Assuming, Your Honor, that we are dealing with rational people.

THE COURT: What would be the purpose of putting the names of Baker and various other prominent people in that book just to testify against these defendants? You have to rationalize about these things. And as the record now stands, Mr. Cobb was advised of the book – it is not contradictory, not denied – in May of 1974.

That will be the ruling the Court. I am not going to permit that book to go out of the custody of the reporter and the clerk, where it is now held with the other exhibits, without the agreement of the United States Attorney. I'm not asking him to sustain the ruling of the Court, but if he wants to agree to it, why of course I would have no objection.

[359] MR. SILER: We don't agree to it, Your Honor.

MR. OLDFIELD: I assume, Your Honor, that we still have no problem with the individual coming and viewing the piece of evidence.

THE COURT: No, tomorrow morning.

MR. COBB: Nor with having the hearing?

THE COURT: Sir?

MR. OLDFIELD: After he views it, we still want to have the hearing.

THE COURT: We can do that, yes. We are going to be here in the morning, as I understand, at 9:00 and as soon as he has viewed the book court will convene and I will let you offer whatever I think is appropriate.

MR. OLDFIELD: Very good, Your Honor.

(Reporter's note: The Court recessed until 9:00 a.m., the following day, November 21, 1974.)